

STATE OF MICHIGAN
COURT OF APPEALS

LONG MECHANICAL, INC.,

Plaintiff-Appellant,

v

RIVER ROUGE SCHOOL DISTRICT and
RIVER ROUGE SCHOOL BOARD,

Defendants-Appellees.

UNPUBLISHED

June 17, 1997

No. 185526

Wayne Circuit Court

LC No. 95501238 CB

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,* JJ.

PER CURIAM.

In this government contract bidding case, plaintiff, Long Mechanical, Inc., appeals as of right from a grant of summary disposition to defendants pursuant to MCR 2.116(C)(8). Long argues that a disappointed bidder for a government contract has standing to sue for injunctive relief and damages. We affirm.

I

In September, 1994, defendant River Rouge School District solicited bids from local construction companies for a project that included the construction of a new middle school and athletic field. Plaintiff bid the mechanical portion of the project. Its bid of \$4,535,000 was the lowest of the six bids submitted. The next lowest was submitted by Macomb Mechanical Incorporated.

On October 31, 1994, plaintiff met with a representative of Barton Marlow Company, the construction manager of the project, and Grenier Incorporated, the architect, to determine whether plaintiff's bid conformed to the requirements of the construction contract. After the meeting, Barton Marlow and Grenier wrote to the School District recommending that plaintiff be awarded the contract. The letter informed the District that, as soon as the defendant River Rouge School Board voted to approve plaintiff for the job, Barton Marlow would issue a letter of intent to plaintiff. The School Board

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

declined to follow Barton Marlow's recommendation and awarded the contract to Macomb Mechanical.

Plaintiff filed a complaint requesting a temporary restraining order (TRO) and other relief to prevent the School Board from awarding the mechanical contract to Macomb Mechanical. The trial court denied plaintiff's motion for a TRO, but ordered the District to show cause why a preliminary injunction prohibiting it from awarding the contract to Macomb Mechanical should not be granted. Following the show cause hearing, the trial court denied plaintiff's motion, finding that plaintiff failed to establish that irreparable injury would result if plaintiff's motion was not granted.

Plaintiff then filed a motion for partial summary disposition claiming that defendants were liable to plaintiff for damages based on theories of breach of contract and promissory estoppel. In response, defendants claimed that plaintiff lacked standing to sue. After oral argument, the trial court entered judgment for defendants holding that a trial court cannot disturb the decision of a school board on a bid unless there has been fraud, abuse or illegality. *Great Lakes Heating, Cooling, Refrigeration and Sheet Metal Corp v Troy School District*, 197 Mich App 312, 315; 494 NW2d 863 (1992). Because plaintiff did not allege fraud, abuse or illegality, the complaint was dismissed.

II

Plaintiff argues that it had standing to seek injunctive relief. We note that the issue is not properly before this Court. Even though it was raised by the parties at the trial court level, the court denied a TRO because plaintiff could not show irreparable harm. *Smit v State Farm Mutual Automobile Ins Co*, 207 Mich App 674, 685; 525 NW2d 528 (1994). Moreover, summary disposition on plaintiff's claims for damages was not granted on the basis of lack of standing, but because plaintiff failed to state a claim upon which relief could be granted. MCR 2.116(C)(8). However, because this issue presents a question of law and the parties have fully briefed it, we will address it. *Brown v Drake-Willock International LTD*, 209 Mich App 136, 146; 530 NW2d 510 (1995).

Standing is a legal term used to denote the existence of a party's interest in the outcome of litigation. *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 655; 517 NW2d 864 (1994). To have standing, a plaintiff must demonstrate: (1) a legally protected interest which is in jeopardy of being adversely affected; and (2) a sufficient personal stake in the outcome of the dispute to ensure that the controversy to be adjudicated will be presented in an adversarial setting that is capable of judicial resolution. *Id.* at 655-656. When standing is an issue in a case, the question is whether the person whose standing is challenged is the proper person to bring suit, not whether the issue itself is justiciable. *Allstate Ins Co v Hayes*, 442 Mich 56, 58; 499 NW2d 743 (1993).

The genesis of Michigan's law relative to the rights of disappointed bidders for government contracts is the Michigan Supreme Court decision of *Talbot Paving Co v City of Detroit*, 109 Mich 657; 67 NW 979 (1896). In *Talbot*, the defendant advertised for bids to pave Griswold street, from Jefferson avenue to Grand River avenue. The plaintiff submitted the lowest bid and John Stewart

submitted the second highest bid. The defendant then awarded the contract to Stewart. The plaintiff brought suit to recover damages resulting from the defendant's action.

The Supreme Court refused to recognize a cause of action for damages on the part of a disappointed bidder, because the charter provisions which stated that it was the duty of the defendant to award the contract to the lowest bidder was passed for the benefit of the public, not the benefit of the bidder. *Id.* at 660. In response to the argument that this rule would lead to government fraud, the Court stated that the proper remedy is to seek an injunction to prevent the making of the contract with the higher bidder. *Id.*

This last statement of the *Talbot* decision is at the crux of the dispute before us in the instant case. Plaintiff asserts that *Talbot* stands for the proposition that a disappointed bidder may seek an injunction to prevent a governmental entity from forming a contract with a higher bidder. Defendants, on the other hand, argue that a careful reading of *Talbot* reflects the notion that only a taxpaying member of the public could seek the injunction. We believe defendant's interpretation of *Talbot* is correct.

In *City of Detroit v Wayne Circuit Judge*, 128 Mich 438; 87 NW 376 (1901), the city of Detroit took bids for a project to repave a street. After the contract had been awarded, another bidder filed suit alleging that the award should have been made to him as the lowest bidder. The Court noted that plaintiff brought suit both as a bidder and as a taxpayer. The Court, citing *Talbot*, found that plaintiff had no standing as a bidder. *Id.* at 439.

Federal courts interpreting Michigan law also have had occasion to address the standing issue. *Malan Construction Corp v Board of County Road Commr's*, 187 F Supp 937 (ED Mich, 1960); *City Communications Inc v City of Detroit*, 650 F Supp 1570 (ED Mich, 1987). In *Malan Construction*, the plaintiffs, New York corporations and non-taxpayers, alleged that the Board of County Road Commissioners of Wayne County conspired with defendant Barton-Malow, the successful bidder, to deprive the plaintiffs of a contract. *Malan, supra* at 938. The Court held:

Competitive bidding is not intended to benefit bidders. It is designed to protect the taxpaying public from fraud or favoritism in the expenditure of government funds for public works projects. The Michigan Supreme Court has held that the duty of public officials to consider honestly competitive bids runs directly to the community and that, therefore, only the public, through a taxpayer's suit, has standing to enjoin a proposed contract. The incidental benefit received by bidders from competitive bidding does not allow an unsuccessful bidder to bring a private action. * * * The plaintiffs assert support for their proposition in the language of *Talbot Paving Co. v. City of Detroit supra*, 109 Mich. At page 662, 67 N.W. at page 981, that '* * * there is a remedy by injunction to prevent the making of a contract with the next higher bidder.' The language quoted, however, in the context of the entire opinion, indeed emphasizes that only the public, not the bidder, could enjoin the awarding of a contract. [*Id.* at 939.]

This principle was reaffirmed in *City Communications, supra*, where the Court held that the law of Michigan was that “disappointed bidders have no standing to challenge the award of public contracts.” *City Communications, supra* at 1581.

In *Great Lakes Heating, Cooling, Refrigeration & Sheet Metal Corp, supra*, the plaintiff submitted a bid after the time allowed for bids to be accepted. When the defendants decided not to open the bid, the plaintiff sued, seeking an order requiring the school district to open and consider the bid. *Id.* at 314. The trial court ordered the defendants to open and consider the bid. The defendant then awarded the contract to the plaintiff. Two disappointed bidders sued the defendants seeking relief from the trial court’s order.

On appeal, this Court reversed. We reasoned that, because a presumption exists that governmental authorities act in good faith, “[t]he exercise of discretion to accept or reject bids will be controlled by the courts only when necessary to prevent fraud, injustice, or the violation of a trust.” *Id.* at 315. However, the issue of standing was not discussed.

We agree with the decision in *Great Lakes* insofar as it states that we will not interfere with public bids unless there is fraud, injustice or illegality. See *Berghage v City of Grand Rapids*, 261 Mich 176; 246 NW 55 (1933); *Leavy v City of Jackson*, 247 Mich 447; 226 NW 214 (1929). However, we find that only taxpayers have standing to bring the cause of action and allege fraud, injustice or illegality. In both *Berghage* and *Leavy*, taxpayers brought suit to enjoin the defendant municipalities from awarding contracts to the higher bidders. Had the issue of standing been raised in *Great Lakes*, we are confident that the Court would have found no standing for the disappointed bidders, following Michigan precedent.

Here, because plaintiff brought suit as a disappointed bidder and not as a taxpayer, we follow Michigan precedent and hold that it did not have standing to seek an injunction preventing the award of the contract to Macomb Mechanical. *Talbot, supra*; *Wayne Circuit Judge, supra*; *Malan, supra*. Nor does plaintiff have standing to sue for damages for breach of contract and promissory estoppel. *Talbot, supra* at 660.¹

Even if we were to find that plaintiff had standing, we would affirm the trial court’s grant of summary disposition pursuant to MCR 2.116(C)(8) for failure to state a claim upon which relief could be granted. The pleadings fail to set forth any allegations of fraud, abuse or illegality by defendants in awarding the contract to Macomb Mechanical. *Great Lakes, supra*.

Affirmed.

/s/ Marilyn Kelly

/s/ Joseph B. Sullivan

¹ We do not dispute the concurring opinion’s finding that other jurisdictions have ruled that a disappointed bidder has standing to enjoin the awarding of a public contract. However, this jurisdiction has established a rule to the contrary. The case of *City of Saginaw v Consumers Power Co*, 213

Mich 460; 182 NW 146 (1921), cited by the concurring opinion, does not support a different conclusion. There, the City of Saginaw sued Consumers Power Company to force it to abide by the terms of a contract signed by the parties. The case did not concern competitive bidding or a disappointed bidder's standing. While the Court mentioned that certain arguments would have been more forceful if made by a competitive bidder, any such statement are dicta.